YUSOF RAHMAT & CO

v.

KAMAL MOHAMAD NOOR;
ASIAH MAHMUD (INTERVENER)

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 12-63-2001]
16 APRIL 2004

CIVIL PROCEDURE: *Parties - Intervention - Leave obtained by intervenor to intervene and be added as a party in execution proceedings brought by plaintiff against defendant - Execution proceedings based on summary judgment - Summary judgment subsequently set aside - Whether execution proceedings rendered res extincta - Whether leave to intervene also rendered academic*

The plaintiff (a firm of solicitors) had brought an action against the defendant and obtained summary judgment against him in the Sessions Court. Thereafter, the plaintiff commenced execution proceedings against the defendant. On appeal by the defendant, the High Court set aside the summary judgment. The plaintiff then sought leave to appeal to the Court of Appeal but it was declined.

The instant appeal by the plaintiff to the High Court was from the decision of the sessions judge allowing the intervenor's application for leave to intervene and be added as a defendant in the aforesaid execution proceedings brought by the plaintiff against the defendant.

Held (dismissing the plaintiff's appeal):

[1] The execution proceedings could not continue as the summary judgment – which formed the basis upon which the proceedings were prosecuted – had been set aside. The foundation had been demolished and the entire execution proceedings were rendered *res extincta*. Accordingly, the leave obtained by the intervenor to intervene and be added as a party in the execution proceedings had also been rendered academic. (pp 142 g & 144 c-e)

Legislation referred to:
Subordinate Courts Rules 1980, O. 8 rr. 6, 13(1), O. 26A

For the intervenor - En Sekar; M/s Sault & Co
For the plaintiff - Mohd Yusmadi M Yusoff (Shamsul Iskandar M Akin); M/s Yusmadi & Co

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal lodged by the plaintiff, a firm of solicitors, on 13 November 2001 against the decision of the learned sessions court judge who on 5 November 2001 allowed the applicant's application in encl. (18) for leave to intervene and to be added as the second defendant ("the intervenor") in Melaka Sessions Court Summons No. 52-705-2000 ("the sessions court summons"), under O. 8 r. 6 of the Subordinate Courts Rules 1980.

Unless the context otherwise requires, a reference hereinafter to an order and a rule is a reference to that order and rule in the Subordinate Courts Rules 1980.

Factual Background

On 16 March 2001, the plaintiff obtained summary judgment under O. 26A ("the summary judgment") against the defendant, one Kamal bin Mohamad Noor in the sessions court summons.

Pursuant to the summary judgment, the plaintiff commenced execution proceedings against the defendant *vide* Sessions Court Execution No. 56-14-2001 ("the execution proceedings").

Meanwhile, on appeal, the summary judgment was set aside by the learned judge on 30 January 2002. On 30 September 2002, the Court of Appeal heard and dismissed the plaintiff's application for leave to appeal to the Court of Appeal, thereby indirectly affirming the decision of the High Court setting aside the summary judgment. Hence, there is no judgment whatsoever on the basis of which the plaintiff may issue the execution proceedings.

Submissions By Parties And Decision Of The Court

1. Defective Notice Of Appeal

It was submitted by learned counsel En. Sekar for the intervenor that the plaintiff's notice of appeal was defective on the ground that the plaintiff had stated, *inter alia*, that:

> Pemohon diberi kebenaran untuk mencelah dan dijadikan satu pihak sebagai Defendan Kedua di dalam prosiding Mahkamah Sesyen Saman No. 52-705-2000.

[My translation:

The Applicant be given leave to intervene and to be made a party as second defendant in the proceedings in Sessions Court Summons No. 52-705-2000.]

He added that leave was actually granted in the execution proceedings ie, Sessions Court Execution No. 56-14-2001 and not in Sessions Court Summons No. 52-705-2000.

Upon perusing the appeal record herein and without feeling the need to hear the reply from the plaintiff's learned counsel, I find that the title cited in the notice of appeal did specifically state the reference numbers of both the sessions court summons and the execution proceedings, as they relate to and concern the same subject matter, the latter being the extension of the former. That being the case, the objection raised for the defendant is in my view a non-issue.

Even if it could have been treated as an issue, there is nothing to convince me that the intervenor has been prejudiced thereby. It has been so firmly stated by our courts that the law does not concern itself with trivialities *(de minimis non curat lex)*. I therefore hold that this objection is wholly without merits, and is hereby overruled. I shall treat the appeal herein as an appeal in the execution proceedings.

2. Execution Proceedings Without Judgment

The submission of learned counsel En. Mohd. Yusmadi M. Yusoff and En. Shamsul Iskandar M Akin for the plaintiff did not cover the commencement of execution proceedings by the plaintiff in the face of the setting aside of the summary judgment by the learned judge on 30 January 2002.

Instead, they raised four issues in relation to the intervenor's application for leave to intervene in the execution proceedings *viz:*

(1) absence of interest on the part of the intervenor, relying on O. 8 r. 6 and O. 8 r. 13;

(2) non-compliance by the intervenor with O. 8 r. 13(1) in the application for leave to intervene;

(3) the intervenor's so-called interest was not an interest within the ambit of O. 8r. 13(1); and

(4) the intervenor's interest is not recognized in law.

For the intervenor, it was contended that since the summary judgment has been set aside, the execution proceedings have now become academic.

In my judgment, I am unable to see how the execution proceedings commenced by the plaintiff can ever be allowed to continue when the summary judgment which formed the basis of the execution proceedings had already been set aside by the learned judge. The summary judgment which established the foundation for the execution proceedings had indeed been demolished. The entire execution proceedings have been rendered *res extincta.*

After the setting aside of that judgment there is plainly and obviously no judgment on which the plaintiff can execute and there is no longer any fruit for the plaintiff to harvest in the field of litigation. The leave granted to the intervenor to intervene has also been rendered academic. The parties should now revert to the stage at which the plaintiff must prove the claim against the defendant or the parties herein must establish their respective rights and obligations.

I do not see the necessity to consider the rest of the submission for the plaintiff, except to record my appreciation for the efforts expended thereon by learned counsel.

Conclusion

This appeal is therefore dismissed.

As to the question of costs, since the intervenor's objection pertaining to the notice of appeal has been overruled, which has been equalized by the dismissal of the plaintiff's appeal, I am of the view that the parties herein should bear their own costs, which I hereby order.